No. 14-915

IN THE

Supreme Court of the United States

REBECCA FRIEDRICHS, ET AL.,

Petitioners,

v.

CALIFORNIA TEACHERS ASSOCIATION, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF FORMER CALIFORNIA GOVERNOR PETE WILSON, FORMER CALIFORNIA SENATE MAJORITY LEADER GLORIA ROMERO, PACIFIC RESEARCH INSTITUTE, AND BIPARTISAN CALIFORNIA EDUCATORS AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Wooley v. Maynard,
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Cal. Educ. Code § 44938.....9

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Bhavini Bhakta, Op-Ed., *California's Pink-Slip Shuffle*, L.A. Times, Dec. 16, 2012, http://articles.latimes.com/2012/dec/16/opinion/la-oe-bhakta-teaching-20121216.....20

Cal. Teachers Ass'n, About CTA, Mission Statement, http://www.cta.org/About-CTA/Who-We-Are/Mission-Statement.aspx 5

Raj Chetty & Alex Olssen, *The Impacts of Last-In, First-Out vs. Effectiveness-Based Teacher Layoff Policies* (2013).....11

Raj Chetty et al., *Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104(9) Am. Econ. Rev. 2633 (2014) 8

Contract between Elk Grove Unified Sch. Dist. Bd. of Trs. and Elk Grove Educ. Ass'n.....16

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Students Matter, Vergara v. California *2013 California Educators Survey Results* (2014), *available at* http://studentsmatter.org/wp-content/uploads/2014/03/SM_Research-Now-Poll-Results_03.05.14.pdf 20

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INTEREST OF *AMICI CURIAE*[1]

Amici are a bipartisan group of former officials that includes a former Republican governor of California and a former Democratic majority leader of the California Senate; a non-partisan public-policy organization; and a bipartisan group of California educators and scholars. *Amici* have a longstanding and deep-rooted interest in California's education system, and are bound by a common concern that agency shop arrangements—which compel public-school teachers who are not union members to finance unions' collective bargaining activities—have a profoundly detrimental impact on California's teachers, the well-being of California's public-school stu-

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[1] Pursuant to this Court's Rule 37.2(a), *amici* gave at least 10 days' notice to counsel for petitioners and counsel for all respondents who entered an appearance in the court of appeals (the union respondents and intervenor California Attorney General Kamala D. Harris) of their intent to file this brief, and letters of consent from these parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the brief's preparation or submission. No person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

dents, and ultimately the entire public-education system in the State.

Pete Wilson was governor of California from 1991 to 1999, and a U.S. Senator from California from 1983 to 1991. Gloria Romero served in the California Senate from 2001 to 2010, including as Majority Leader from 2005 to 2008 and as Chairwoman of the Education Committee from 2008-2010. Both Governor Wilson and Senate Majority Leader Romero have extensive experience with matters of education policy and collective bargaining.

Eric Hanushek is the Paul and Jean Hanna Senior Fellow at the Hoover Institution of Stanford University. He studies educational issues from an economic perspective, and has promoted the idea that teacher proficiency should be measured by increased student achievement.

Peter H. Hanley is Executive Director of the American Center for School Choice. He has three times been elected president of the San Mateo Union High School District Board and is currently board president of Amethod Public Schools, a charter school management organization. He has also served four terms in the California School Boards Association Delegate Assembly.

Pacific Research Institute ("PRI") is a non-profit, non-partisan 501(c)(3) organization that champions individual freedom, opportunity, and personal responsibility through the advancement of free-market policy solutions and private initiative. The PRI Education Studies research center publishes research and promotes outreach regarding a number of important topics in the education field, such as teacher quality, academic standards, school finance reform,

and parental choice in education. For example, in March 2002, PRI researchers published a comprehensive study analyzing the collective bargaining agreements used in 460 California school districts. *See* Pamela A. Riley et al., Pac. Research Inst., *Contract for Failure: The Impact of Teacher Union Contracts on the Quality of California Schools* 1-2 (2002), *available at* http://www.pacificresearch.org/docLib/20070205_contractforfailure.pdf. Based on this study, PRI researchers concluded that many of the policies in collective bargaining agreements "erode[ ] the authority of the school board and district management to make important decisions," "harm[ ] teachers," and are "detrimental to student achievement." *Id.*; *see also* Lance T. Izumi et al., Pac. Research Inst., *Not as Good as You Think: Why the Middle Class Needs School Choice* 109 (2007), *available at* http://www.pacificresearch.org/docLib/20070924_Middleclass.pdf.

A full list of the signatories to this brief is set forth in the Appendix.

All of the *amici* have a significant interest in the outcome of this case, which tests the constitutionality of agency shop arrangements. Collective bargaining agreements between unions and school districts address virtually every aspect of teachers' professional lives and students' classroom experiences, including policies on teacher discipline, retention, and compensation that provoke heated debate within the teaching profession and that have a substantial effect on student outcomes. By requiring nonmember teachers to subsidize unions' viewpoints on these matters—including positions that many teachers believe to be detrimental to their own professional careers and to the well-being of their students—agency

shop arrangements violate the core First Amendment guarantee that individuals are free to decide "both what to say and what *not* to say." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988). The Court should grant review to reconsider, and ultimately reject, the constitutionality of these coercive union-funding obligations, which disregard the First Amendment rights of public-school teachers and the well-being of the students for whom they are responsible.

SUMMARY OF ARGUMENT

I. In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), this Court held that a State cannot compel public employees who are not union members to make financial contributions to unions' "political" and "ideological" causes because those mandatory exactions violate the principle, residing "at the heart of the First Amendment," that "one's beliefs should be shaped by his mind and his conscience rather than coerced by the State." *Id.* at 234-35. At the same time, the Court upheld agency shop arrangements that require nonmember public employees to finance unions' "collective bargaining, contract administration, and grievance-adjustment" activities. *Id.* at 225-26.

This distinction is constitutionally insupportable in any public-employment context, but is especially problematic in the public-school setting. *Abood* fails to appreciate that, during the collective bargaining process, teachers' unions advocate positions on intensely divisive educational policies, some of which—from the perspective of nonmember teachers—are harmful to both teachers and the students in their charge. Under *Abood*, however, nonmember teachers have no choice but to bankroll the very policies to

which they so strenuously object as detrimental to their own careers and the well-being of their students.

In particular, school districts and teachers' unions negotiate discipline, layoff, assignment, and compensation policies, as well as protections for academic freedom, all of which directly affect teachers' professional lives and students' classroom performance. Most of these issues are the subject of extensive disagreement among members of the teaching profession. For example, many teachers disagree with teacher discipline, layoff, assignment, and compensation policies that operate exclusively (or principally) based on seniority, without regard to teachers' performance, and object to school district policies that place limitations on teachers' freedom to introduce students to diverse or unconventional areas of study. These policies, in the minds of many public-school teachers, are antithetical to the teaching profession's central mission of "enhanc[ing] the quality of education for students." Cal. Teachers Ass'n, About CTA, Mission Statement, http://www.cta.org/About-CTA/Who-We-Are/Mission-Statement.aspx (last visited Feb. 26, 2015).

Yet, despite the strong opposition of many nonmember teachers to the educational policies that teachers' unions espouse, nonmember teachers can be (and commonly are) compelled to subsidize unions' collective bargaining activities on these matters as a condition of their public employment. Moreover, agency shop arrangements effectively designate unions as the advocates for the interests of both nonmember and member teachers in negotiations with school districts, even though nonmembers may well have very different views from the unions that they

have no means of airing during the collective bargaining process. These intolerable burdens on nonmember teachers' speech and petition rights—countenanced in *Abood* based on reasoning that has failed to withstand the test of time—should be reconsidered and rejected by this Court.

II. According to *Abood*, the "'primary purpose'" of agency shop arrangements is to prevent nonmember employees from "'free riding'" on dues-paying union members during the collective bargaining process. *Knox v. Serv. Emps. Int'l Union*, 132 S. Ct. 2277, 2289 (2012) (citation omitted); *see also Abood*, 431 U.S. at 224. It is far from the case, however, that nonmember public-school teachers necessarily benefit from the policies advocated by teachers' unions during collective bargaining. To the contrary, many teachers—particularly those who perform at or near the top of their profession—are, in fact, *harmed* by the policies that unions advance during collective bargaining.

For example, teachers who are new to the profession or to particular school districts often find themselves at risk of being laid off or involuntarily transferred to another school—even when they have achieved extraordinary success in the classroom—due to provisions in collective bargaining agreements that make important employment decisions dependent primarily, if not entirely, on teacher seniority. Moreover, many union-supported policies make it exceedingly difficult for school districts to discipline underperforming or incompetent teachers, which creates a disincentive for school district administrators even to initiate disciplinary proceedings. As a result, failing teachers remain in the classroom year after year, and the teachers who teach alongside

them are forced to spend valuable classroom time trying to repair the academic damage that these substandard teachers have inflicted on their students. In addition, "single salary schedules"—another product of the collective bargaining process—require teachers of the same seniority and education levels to be compensated exactly the same as one another, regardless of the schools to which they are assigned, the subject matter that they teach, or how effective they are in the classroom. This lock-step compensation model penalizes teachers in disadvantaged schools and hard-to-staff teaching fields, as well as the most effective teachers in our public-school system, all of whom would be better off under a compensation system designed to reward teacher quality and improve student outcome.

Thus, the only "free ride" that teachers' unions can conceivably offer to many nonmember teachers is one that takes them further from the destination they aspire to reach—a merit-based teaching profession dedicated, first and foremost, to the well-being of its students. Coerced financial support for public unions cannot be justified on so flawed a rationale.

ARGUMENT

I. COLLECTIVE BARGAINING IN THE PUBLIC EDUCATION CONTEXT IS INEXTRICABLY INTERTWINED WITH TEACHERS' PROFESSIONAL LIVES, STUDENTS' ACHIEVEMENT, AND NONMEMBERS' FIRST AMENDMENT RIGHTS.

In *Abood*, this Court acknowledged that agency shop arrangements "interfere" with public employees' "freedom to associate for the advancement of ideas, or to refrain from doing so, as [they] see[ ] fit."

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 222 (1977). The Court nevertheless deemed this interference justified to the extent that nonmembers' financial contributions are used to fund collective bargaining activities that establish school district policies on "bread and butter" issues like "wages, hours, vacations, and pensions." *Id.* at 258 (Powell, J., concurring). In so holding, the Court failed to appreciate that many of the policies that are established during the collective bargaining process—even those that ostensibly govern only the "terms and conditions" of teachers' employment—heavily influence teachers' professional trajectories and the achievement of their students, and therefore rest at the very core of teachers' First Amendment interests. *Id.* at 220 (majority opinion).

A. School district policies that emerge from the collective bargaining process affect which teachers school districts may employ (or continue to employ) and the schools to which those teachers are ultimately assigned. This, in turn, shapes the quality and equality of students' educational opportunities. *See* Raj Chetty et al., *Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104(9) Am. Econ. Rev. 2633, 2634 (2014) (explaining that teacher effectiveness "has substantial impacts on a broad range of [student] outcomes"). Agency shop arrangements compel nonmembers to fund unions' views on these policies—despite the detrimental impact the unions' negotiating positions may have on some teachers' professional lives and the well-being of their students.

For example, unions commonly negotiate for provisions in collective bargaining agreements that require school districts to overcome a gauntlet of pro-

cedural obstacles—verbal reprimands, meetings, and notices—before they can discipline underperforming or failing teachers. *See, e.g.*, Agreement between L.A. Unified Sch. Dist. Bd. of Educ. and United Teachers L.A., art. X, § 11.0 ("L.A. Agreement") (requiring school district to provide notifications and meetings to underperforming teachers before a notice of unsatisfactory service or act may be issued); Contract between S.F. Unified Sch. Dist. Bd. of Educ. and United Educators of S.F. (effective July 1, 2012), art. 28 ("S.F. Agreement") (requiring school district to provide verbal reprimands, written reprimands, a statement of incident or misconduct, and a statement of discipline before a teacher may be suspended without pay).

These contractually-mandated steps—which operate in tandem with various statutory requirements governing teacher dismissals in California, *see* Cal. Educ. Code §§ 44934, 44938, 44944—can constitute "tortuous" impediments to an effective disciplinary process, "caus[ing] districts in many cases to be very reluctant to even commence" the discipline of a failing teacher. *Vergara v. California*, No. BC484642, slip op. at 11, 12 (Cal. Sup. Ct. Aug. 27, 2014), *available at* http://goo.gl/ThBjNQ. The inevitable result is that underperforming or incompetent teachers remain in the classroom year after year, imposing "a direct, real, appreciable, and negative impact on a significant number" of students. *Id.* at 8; *see also id.* at 7 ("[A] single year in a classroom with a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom."). Those poorly performing teachers occupy positions that would otherwise be available to highly motivated, entry-level teachers eager to embark on a new career and to cre-

ate the optimal classroom environment for their students.

Teachers' unions also frequently advocate, and persuade school boards to adopt, policies requiring district-wide reductions in force to be implemented on the basis of teacher seniority. *See* L.A. Agreement, art. XIII, § 3.6 ("The order of termination within a teaching or service field . . . shall be based on seniority within status . . . ."); *see also* Dan Goldhaber & Roddy Theobald, *Assessing the Determinants and Implications of Teacher Layoffs* 3 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper 55, 2010) ("[I]n the overwhelming majority of [collective bargaining] agreements, seniority is the determining factor in which teachers are laid off first with 'last hired, first fired' provisions.").

These quality-blind reduction-in-force policies—together with overlapping statutory provisions, *see* Cal. Educ. Code § 44955—result in the termination of countless highly-effective, well-liked teachers and the retention of a disproportionately high percentage of below-average teachers. *See* Goldhaber & Theobald, *supra*, at 2 ("[A] very different group of teachers would be targeted for layoffs under an effectiveness-based layoff scenario than under the seniority-driven system that exists today."). Indeed, seniority-driven layoff policies are a barrier to the ability of many newer teachers—including teachers from diverse backgrounds with unique viewpoints—to remain in the public-school teaching profession at all.

It is well-documented that these last-in-first-out layoff policies impose severe and potentially irreparable harm on students. In a recent study, researchers implemented a hypothetical 5% reduction in the teaching force of the Los Angeles Unified School Dis-

trict, and compared the effects of a seniority-based reduction in force (as currently mandated by the District's collective bargaining agreement) to a reduction based on teacher effectiveness. *See* Raj Chetty & Alex Olssen, *The Impacts of Last-In, First-Out vs. Effectiveness-Based Teacher Layoff Policies* 1 (2013), *Vergara*, No. BC484642, Pls.' Exhibit 9. The results are alarming: a seniority-based reduction in force decreases student test scores by an average of 11 percentile points relative to an effectiveness-based reduction in force, and these test-score decreases translate into a loss in lifetime earnings of $87,000 per student. *Id.* at 2-3.

Worse still, minority and low-income students "bear the brunt" of these seniority-driven teacher layoff policies. *Vergara*, No. BC484642, slip op. at 15 (internal quotation marks omitted). Minority and low-income students are assigned to junior teachers at a disproportionately high rate, and are therefore forced to endure a constant "churning . . . of teachers" when district-wide reductions in force become necessary. *Id.* As one California court recently concluded after a ten-week bench trial, this relentless revolving door of teachers "greatly affects the stability of the learning process to the detriment of such students." *Id.*; *see also* Goldhaber & Theobald, *supra*, at 15 ("[T]here are achievement consequences associated with the churn of teachers.").

Teachers' unions similarly promote teacher transfer and assignment policies that afford preferential treatment to teachers on the basis of seniority. *See, e.g.*, L.A. Agreement, art. XI, § 6.c ("[W]hen there is an over-teachered condition, the teacher with the least District seniority . . . will be displaced . . . ."); Agreement between Oakland Unified Sch. Dist. Bd.

of Educ. and Oakland Educ. Ass'n (effective July 1, 2005), art. 12.4.2 ("Oakland Agreement") ("[S]eniority . . . shall be given preference in granting an assignment."). In practice, teachers with seniority tend to invoke this preferential treatment by transferring to or seeking assignments at schools with higher percentages of Caucasian and/or affluent students. *See* Eric A. Hanushek et al., *Why Public Schools Lose Teachers*, 39(2) J. Hum. Resources 326, 328 (2004). As a result, schools that serve predominately minority and low-income students are forced to staff their teacher ranks with the very same junior teachers who are most vulnerable to seniority-based reductions in force, thus feeding into and exacerbating the churn that is so detrimental to student outcomes.[2]

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[2] Collective bargaining agreements also establish and regulate district-wide Peer Assistance and Review ("PAR") programs, which provide underachieving teachers with individualized goal-setting plans, mentorship meetings with other teachers, periodic reports and evaluations, and additional professional development activities. *See, e.g.*, L.A. Agreement, art. X-A; Agreement between Sacramento City Unified Sch. Dist. Bd. of Educ. and Sacramento City Teachers Ass'n (effective July 1, 2004), Appx. H; S.F. Agreement, art. 39. Although there is widespread agreement that struggling teachers should receive some measure of assistance, some PAR programs can operate, in practice, to delay the discipline or dismissal of failing teachers who are entirely unable or unwilling to meet basic satisfactory performance standards. Thus, in the view of many educators, while PAR programs may have admirable goals and may achieve some measure of success, the time and money that is dedicated to PAR programs would be better spent enriching the lives of students in other ways because "it takes more resources to serve struggling veterans than new teachers, many of whom are likely to succeed." John P. Papay & Susan Moore Johnson, *Is PAR a Good Investment? Understanding the Costs and Benefits of Teacher Peer Assistance and Review Programs*

In addition, collective bargaining sets school district policy on teacher compensation, and has resulted in the near-universal adoption of "single salary schedules"—uniform pay schedules that compensate teachers based almost exclusively on their number of years of teaching experience and level of education. Michael Podgursky, George W. Bush Inst., *Reforming Educator Compensation* 4-5 (2014); *see also* Oakland Agreement, art. 24.2.4 ("All unit members shall advance one step on the salary schedule for each year of service in the District . . . ."); Agreement between San Jose Unified Sch. Dist. Bd. of Educ. and San Jose Teachers Ass'n, art. 36110 ("San Jose Agreement") (stating that teachers' salaries are based on "graduate units" and "years of experience"). Many nonmember teachers, however, profoundly disagree with this "homogenization of public school teachers," which harms teachers and students alike in several significant ways. Podgursky, *supra*, at 7.

"Single salary schedules" equalize teacher compensation regardless of how effective teachers are in the classroom, thereby disincentivizing the very "best people [from] enter[ing] or remain[ing] in the profession" in service of students. Hanushek, *supra*, at 44. In contrast, a compensation system that *rewards* its most effective teachers would have a "selection effect," and would draw "teachers into the workforce who are relatively more effective at meeting . . . performance targets" in the classroom. Podgursky, *supra*, at 7. The equalized pay system that arises out

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13 (2011); *see also* Eric A. Hanushek, *Valuing Teachers: How Much Is a Good Teacher Worth?*, 11(3) Educ. Next 41, 44 (2011) ("[T]here is no substantial evidence that . . mentoring programs systematically make a difference in whether teachers are in fact effective at driving student achievement.").

of the collective bargaining process therefore "tends to lower overall [teacher] effectiveness" and, as a result, student achievement. *Id.*

"Single salary schedules" do further harm to student outcomes—as well as the ability of school districts to staff their schools in a sensible way—by ignoring the very real differences that exist in school environments and teaching fields. Podgursky, *supra*, at 7. Because all teachers of equivalent seniority and education level are compensated exactly the same, regardless of the schools or fields in which they teach, teachers are less likely to seek employment in schools with difficult working conditions and in hard-to-staff teaching fields, such as special education, high-school mathematics, and high-school science. *Id.* at 5-7; *see also* Joshua Barnett & Gary W. Ritter, *When Merit Pay Is Worth Pursuing*, 66(2) Educ. Leadership (2008), *available at* http://www.ascd.org/publications/educational-leadership/oct08/vol66/num02/When-Merit-Pay-Is-Worth-Pursuing.aspx ("Because the current system includes no monetary rewards directly tied to effectiveness, many effective teachers seek more 'compensation' through better working conditions, often choosing to leave schools with a high population of disadvantaged students and challenging teaching conditions for schools serving more advantaged students."). This, in turn, leads to unfilled teacher rosters at high-poverty schools, vacancies in hard-to-staff teaching fields, and an ineffective practice of assigning teachers "out of field" or with substandard licenses simply to fill vacant positions. Podgursky, *supra*, at 5-7.

As these examples make clear, the policies that are established during the collective bargaining process have far-reaching consequences for teachers'

professional lives and the achievement of the students for whom they are responsible. Yet, despite the serious misgivings that many nonmember teachers have about the effect of these policies on their own careers and the success of their students, agency shop arrangements leave nonmember teachers with no choice but to provide financial support for the unions' positions on these intensely personal, and profoundly important, policy matters.

B. In addition to setting the terms of teachers' discipline, transfers, layoffs, and compensation, collective bargaining between unions and school districts also establishes district policy regarding the scope of teachers' academic freedom, a speech interest that this Court has held to be a "special concern of the First Amendment." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) (internal quotation marks omitted). Given the vital importance of a robust and open exchange of ideas in the classroom, many teachers believe that expansive guarantees of academic freedom are crucial to ensure that controversial subjects are brought "'out in the open for discussion'" and deliberation. *See* Charles C. Read, *Collective Bargaining and Academic Freedom in Lower Education: A Practical Inquiry*, 1 Berkeley J. Emp. & Lab. L. 249, 256 (1976) (citation omitted); *see also Keyishian v. Bd. of Regents of the Univ. of N.Y.*, 385 U.S. 589, 603 (1967) ("[A]cademic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned.").

Teachers' unions, however, commonly agree to collective bargaining agreements that place substantive limitations on teachers' academic freedom. In particular, some collective bargaining agreements narrowly define the type of academic expression that

is entitled to protection. *See, e.g.*, L.A. Agreement, art. XXV, § 1.c (prohibiting lesson plans that reflect "personal opinion"); San Jose Agreement, art. 34200 ("An employee . . . shall not utilize his/her position to attempt to influence students with his/her own personal . . . views."); Contract between Elk Grove Unified Sch. Dist. Bd. of Trs. and Elk Grove Educ. Ass'n (2013-2015), art. 4, § 4.402 ("Academic freedom is not an absolute."); *cf.* S.F. Agreement, art. 6.2 ("[T]he teacher is free to present in the field of his or her professional competence his/her opinions or convictions and with them the premises from which they are derived.").

Many teachers—including many teachers who decide not to join a union—believe that these limitations create an unwarranted risk that students will be denied "exposure to [a] robust exchange of ideas" and the benefit of a vibrant, free, and open learning environment. *Keyishian*, 385 U.S. at 603. Under agency shop arrangements, however, nonmember teachers who hold such beliefs are coerced into providing financial support for the collective bargaining efforts of unions that promote, or otherwise accede to, these policies.

C. The "heavy burden" that agency shop arrangements impose on the First Amendment rights of nonmember public-school teachers, *Harris v. Quinn*, 134 S. Ct. 2618, 2643 (2014)—who are compelled to fund bargaining in which unions advocate policies that the teachers may view as detrimental to their own careers and the success of their students—is incompatible with this Court's First Amendment jurisprudence.

In fact, *Abood* itself recognized the severity of this burden, declaring that agency shop arrangements

interfere with the "moral" and "religious views," "economic" and "political" beliefs, and "ideological" viewpoints of nonmember employees. 431 U.S. at 222-23. In more recent cases, the Court has repeatedly underscored this "significant impingement on [the] First Amendment rights" of nonmember employees, reiterating that it is equally abhorrent to the First Amendment for the government to "compel the endorsement of ideas" as it is for the government to "prohibit the dissemination of ideas that it disfavors." *Knox*, 132 S. Ct. at 2288, 2289.

While *Abood* drew a distinction between union fees used for "political" and "ideological" causes, on the one hand, and "collective bargaining activities," on the other, subsequent decisions have exposed the artificiality and unworkability of that division. Indeed, it is no longer open to dispute that a "public-sector union takes many positions during collective bargaining that have powerful political and civic consequences." *Knox*, 132 S. Ct. at 2289; *see also Harris*, 134 S. Ct. at 2632 ("In the public sector, core issues such as wages, pensions, and benefits are important political issues . . . ."). With respect to each of the policies discussed above—teacher discipline, transfers, layoffs, and compensation, as well as academic freedom—the objections of nonmember teachers to unions' collective bargaining activities are often based on deeply-rooted personal, political, and ideological concerns, including the impact that such activities will have on their professional lives, the well-being of their students, and ultimately, the success of the public-education system as a whole. The freedom-of-speech concerns that prompted the *Abood* Court to condemn compelled subsidies for unions' lobbying activities therefore apply with equal force to agency shop arrangements that compel nonmember

teachers to fund unions' collective bargaining activities.

In addition, agency shop arrangements impose an independent, and equally unacceptable, burden on nonmember teachers' right to petition the government about matters of public concern, a right that has long been recognized as "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am. v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967); *see also McDonald v. Smith*, 472 U.S. 479, 483 (1985) ("[T]he values in the right of petition as an important aspect of self-government are beyond question . . . ."). This "essential" right is "integral to the democratic process" and ensures that citizens are free to convey their "special concerns" to the government. *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011). And, just as the freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all," *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), the right to petition carries with it a concomitant right to refrain from supporting or associating with petitioning efforts with which one disagrees. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) ("Freedom of association . . . plainly presupposes a freedom not to associate.").

Agency shop arrangements, however, coerce public school teachers who elect not to join a union to finance the petitioning activities of unions "with which they broadly disagree" on matters of great "public concern" and to cede their petitioning rights to advocates that are urging different positions from the ones the nonmembers themselves would take if permitted to bargain directly with the school district. *Harris*, 134 S. Ct. at 2623, 2640; *see also Bor-*

ough of Duryea, 131 S. Ct. at 2491. Because individuals must be permitted to express their own "ideas, hopes, and concerns to their government and their elected representatives," *id.* at 2495, they cannot be compelled to finance the petitioning activities of groups that seek to attain goals inconsistent with their own personal beliefs and professional aspirations.

II. THE FREE-RIDER JUSTIFICATION FOR AGENCY SHOP ARRANGEMENTS IS FUNDAMENTALLY FLAWED.

Abood's principal justification for upholding agency shop arrangements—to prevent purported free-riding by nonmembers on unions' collective bargaining efforts—is flawed in multiple respects. As an initial matter, that rationale cannot be reconciled with this Court's subsequent precedent. Indeed, on multiple occasions, this Court has made clear that the free-rider justification animating *Abood* is "something of an anomaly" and that "free-rider arguments . . . are generally insufficient to overcome First Amendment objections." *Harris*, 134 S. Ct. at 2627; *Knox*, 132 S. Ct. at 2289, 2290.

More fundamentally, the free-rider justification is impossible to square with the real-world implications of compelling nonmember teachers to fund educational policies with which they may vehemently disagree. In fact, in many settings, the danger that nonmember public-school teachers will "free ride" on unions during the collective bargaining process is wholly illusory because, in the view of many nonmember teachers, they do not "obtain[] benefits [from] union representation" during collective bargaining. *Abood*, 431 U.S. at 221-22. To the contrary, many nonmember teachers are manifestly harmed

by these collective bargaining activities and are forced to subsidize views contrary to their professional and economic interests.

For example, new, high-performing teachers commonly find themselves at risk of losing their teaching positions, or of being transferred to another school against their will, due to union-backed policies that prioritize teacher seniority above performance in the classroom. *See supra* Part I.A; *see also* Bhavini Bhakta, Op-Ed., *California's Pink-Slip Shuffle*, L.A. Times, Dec. 16, 2012, http://articles.latimes.com/2012/dec/16/opinion/la-oe-bhakta-teaching-20121216 (recounting that the author lost her teaching position four times in eight years due to her relative lack of seniority, even though she was named a "Teacher of the Year"). Such policies impair the ability of motivated, student-focused teachers to progress, or even remain, in their chosen profession.

It should come as no surprise, then, that a significant proportion of teachers (union members and nonmembers alike) do not support many of the policies that are set forth in their collective bargaining agreements. In fact, a survey of California public-school teachers released last year shows that the majority of teachers believe that teacher morale is negatively affected by reduction-in-force policies that are based, either primarily or solely, on teacher seniority. *See* Students Matter, Vergara v. California *2013 California Educators Survey Results* 17-18 (2014), *available at* http://studentsmatter.org/wp-content/uploads/2014/03/SM_Research-Now-Poll-Results_03.05.14.pdf.

Similarly, many teachers oppose discipline policies contained in collective bargaining agreements that can lead to the entrenchment of habitually un-

derperforming teachers in the classrooms next door to them. For many reasons, a significant proportion of "teachers . . . do not want grossly ineffective colleagues in the classroom." *Vergara*, No. BC484642, slip op. at 12. For example, the continued employment, and inability or unwillingness to improve, of these substandard teachers makes it difficult for high-performing teachers to engage in collaborative lesson-planning and co-teaching. *See* Elaine Allensworth et al., Consortium on Chi. Sch. Research, *The Schools Teachers Leave* 25, 30 (2009) (finding that teachers are more likely to remain in schools that have a "shared commitment among the faculty to improve the school" and are more likely to leave when colleagues are "uncooperative and resistant to change"). And because students assigned to underperforming teachers fall far behind their peers, the presence of ineffective teachers requires high-performing teachers to expend tremendous effort simply trying to bring these students back up to grade level.

Moreover, highly-effective teachers routinely find that their excellence in the classroom is not adequately recognized in the compensation that they receive, a product, in part, of the "single salary schedules" that unions and school districts adopt during the collective bargaining process. *See* Daniel Weisberg et al., The New Teacher Project, *The Widget Effect* 6 (2009) ("Fifty-nine percent of teachers . . . say their district is not doing enough to identify, compensate, promote and retain the most effective teachers."). Many teachers desire professional acknowledgment and compensation commensurate with their achievements, rather than a system that treats all teachers as interchangeable parts. *See id.* By failing to distinguish among teachers, "single sal-

ary schedules" deny outstanding teachers the recognition and compensation that they so justly deserve. *See* Barnett & Ritter, *supra* ("[U]nder a merit-based [compensation] scheme, the most effective teachers would consistently earn large bonuses . . . .").

In short, many nonmember public-school teachers do not want, need, or seek out a "free ride" that will continue to deliver them the status quo—a system that prioritizes the needs of more-senior teachers (regardless of their performance level) at the expense of newer, higher-performing teachers and the students for whom they are responsible. Instead, these nonmember teachers hold the "deeply rooted" belief that these employment-related decisions should be based on teachers' "individual merit or achievement," and that an education system founded on merit-based principles will ultimately benefit all students. *Regents of the Univ. of Cal.*, 438 U.S. at 360-61 (Brennan, J., concurring in part and dissenting in part) (citing *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 173-74 (1977) (Brennan, J., concurring, in part)). This Court should grant review and overrule *Abood* to enable public schools throughout the country to realize that promise.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX OF SIGNATORIES

Gary Beckner is Executive Director of the Association of American Educators, an alternative, non-union professional organization of teachers that provides liability insurance and other benefits to teachers who do not want to join their union.

Alan Bonsteel is a physician and long-time public proponent of school choice, who is president and founder of California Parents for Educational Choice ("CPEC"). He is author of *A Choice for Our Children: Curing the Crisis in America's Schools* (1997).

Mark Bucher is President of the California Policy Center and an attorney who has been active in public policy since 1993, particularly with respect to Proposition 174 (school choice) and Proposition 226 (union use of dues for political purposes).

Sandra Crandall, twice elected, is a member of the Fountain Valley School District Board of Trustees in Orange County, California. Mrs. Crandall was an elementary teacher for 39 years, a recipient of the Fountain Valley School District Teacher of the Year in 2005, and was an agency fee payer.

Lydia Grant is a California parent activist who helped get the California "Parent Trigger" law off the ground. She is a member of the board for Parent Revolution, the Education Chair for the Saving Los Angeles Project, and a Los Angeles City Commissioner on the Board of Neighborhood Commissioners. Ms. Grant also served as the Education Representative for the Sunland-Tujunga Neighborhood Council.

Peter H. Hanley is Executive Director of the American Center for School Choice. With extensive policy and business experience, he has three times been elected president of the San Mateo Union High School District Board and is currently board president of Amethod Public Schools, a charter school management organization. He has also served four terms in the California School Boards Association Delegate Assembly, and has pressed for academic reform and accountable professional development, among other initiatives.

Eric Hanushek is the Paul and Jean Hanna Senior Fellow at the Hoover Institution of Stanford University. He studies educational issues from an economic perspective, and has promoted the idea that teacher proficiency should be measured by increased student achievement. He is a graduate of the Air Force Academy and has a Ph.D. from MIT.

Victoria Heggem is a teacher in Arcadia, California, and board member of California Teachers Empowerment Network ("CTEN"), a non-profit, non-union information resource for teachers interested in education reform. She is a "religious objector" pursuant to a provision in California law that allows individuals who object to unions on religious grounds to have their compulsory union dues paid to an eligible charity.

Darren Miller is a high school math teacher in suburban Sacramento and a board member of CTEN. He previously served as a school site union representative, but currently rejects union membership and is an agency fee payer. He has maintained

"Right on the Left Coast," a successful blog, for over 10 years.

Pacific Research Institute ("PRI") is a non-profit, non-partisan 501(c)(3) organization that champions individual freedom, opportunity, and personal responsibility through the advancement of free-market policy solutions and private initiative. PRI believes that free interaction among consumers, businesses, and voluntary associations is more effective than government action in providing good schools, quality health care, a clean environment, and economic growth. PRI's activities include publishing books and studies, giving commentary to media, providing legislative testimony, hosting public events, and conducting grassroots and community outreach.

Gloria J. Romero served in the California Senate from 2001 to 2010, including as Majority Leader from 2005 to 2008, the first woman to hold that leadership position, and as Chairwoman of the Education Committee from 2008-2010. She founded and currently heads the California Center for Parent Empowerment and leads the California chapter of Democrats for Education Reform.

Larry Sand is President of CTEN and a well-known education-reform activist. Mr. Sand is a retired teacher who began his teaching career in New York in 1971. Beginning in 1985, he taught elementary school as well as English, math, history and ESL in the Los Angeles Unified School District, where he also served as a Title 1 Coordinator.

Pete Wilson served as the 36th governor of California (1991-1999), a United States Senator (1983-1991), the Mayor of San Diego (1971-1983), and a California State Assemblyman (1967-1971).